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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 462

MORRIS SMITH, RANDOLPH PHILLIPS, and DAVID WIENER, individually and on their own behalf and that of all other shareholders of Alleghany Corporation similarly situated and derivatively on behalf of ALLEGHANY CORPORATION,

Petitioners,

-against-

ALLAN P. KIRBY, Jr. and FRED M. KIRBY II as Guardians of the Property of ALLAN P. KIRBY; Charles T. Ireland, Jr. and Robert J. Fitzsimmons, and ALLEGHANY CORPORATION,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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To the Honorable Chief Justice and Associate Justices:

Petitioners pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit denying petitioners' motion to vacate for lack of jurisdiction the opinion and judgment dated May 8, 1968 in Docket Nos. 28397, 31115 and 31342, and to review said judgment, opinion and related orders.

OPINIONS BELOW

No opinion was filed by the Court of Appeals in denying the Motion to Vacate for lack of jurisdiction its opinion and judgment dated May 8, 1968. The opinion which was the subject of the motion is appended as Appendix A hereafter and is reported at 394 F. 2d 381 (2 Cir. 1968). The opinion of the district court is appended as Appendix B hereafter and is reported at 264 F. Supp. 268 (DCNY 1967)

JURISDICTION

The order denying the motion to vacate the opinion and judgment of the 3-judge court below for lack of jurisdiction was dated June 5, 1968 and entered on that date (78a), thereby making final the judgment (79a) and related orders dated and entered on May 8, 1968. (80a-81a). Jurisdiction is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

Jurisdictional questions

1. Where a Court of Appeals sitting in banc, pursuant to Section 46(c) of Title 28, U. S. C., has "heard and determined" an appeal by a 4-4 vote, do two circuit judges and a district judge sitting by designation as a circuit judge, have jurisdiction under Section 46(c) to "hear and determine" appeals and motions seeking to vacate the in banc judgment for lack of Constitutional jurisdiction and fraud upon the in banc court?

2. Do the acts of the 3-judge panel in hearing and determining motions and appeals directed to the vacatur of a judgment entered by 8 circuit judges sitting in banc constitute an unauthorized "rule of practice and procedure" that has been promulgated neither by this Court nor the court below and in violation of Section 2071 of Title 28 U. S. C. ?

3. Where prior to the decision and entry of judgment by a Court of Appeals sitting in banc, the defendant-appellees acquired control of the plaintiff-appellant corporation is the judgment void because of the lack of an existing "case" or "controversy" between "parties having adverse legal interests" within the meaning of the Constitution of the United States, Article 3, Section 2 and the decisional law of this Court? *

4. May stockholders who were not parties to the in banc judgment and who had no notice of the action until more than a year after its entry be barred by a 3-judge panel from attacking it for lack of Constitutional jurisdiction in the 8-judge in banc Court of Appeals on res judicata grounds when the jurisdictional issue was neither submitted to the court nor "heard and determined" nor raised sua sponte either in the panel or in banc court or in this Court in granting and then dismissing on other grounds the petitions for writ of certiorari (Holt v. Kirby, 384 U. S. 28) ?

* Poe v. Ullman, 367 U. S. 497, 505, citing South Spring Gold Co. v. Amador Gold Co., 145 U. S. 300; Aetna Life Insurance Co. v. Haworth, 300 U. S. 227, 240-241; Mills v. Green, 159 U. S. 651, 654 and cases cited.

Conflict of circuit questions

5. In view of the conflict between the circuits which Court of Appeals has stated the correct procedure for counsel to follow in seeking to vacate on the ground of fraud upon the court a judgment affirmed by a Court of Appeals:

(a) the Court of Appeals for the Second Circuit in requiring in this case that the affidavits in support of the charge of fraud first must be offered in the district court?

(b) the Court of Appeals in the other Circuits who require, as petitioners did here, that the affidavits first be filed in the Court of Appeals that affirmed the judgment?

6. May petitioners be denied a trial of their charges of fraud and of the credibility of the conflicting affidavits of the federal special master, the defendants' attorneys, and the moving parties because they offered their affidavits not in the district court but in the Court of Appeals as required by Hazel-Atlas Co. v. Hartford Empire, 322 U. S. 238, 249, note 5; In re Potts, 166 U. S. 263; Hartman v. Lauchli (8 Cir.), 304 F. 2d 431, 432-433; and Goldwyn Pictures Corp. v. Howell Sales Co., (2 Cir.), 287 F. 100?

Questions under Rule 53(a), F. R. C. P.

7. Where the rule is clear that "The practice of masters approaching litigants' attorneys and bargaining with them for fees is not consistent with the proper administration of the office and should not be sanctioned" (Universal Oil Products Co. v. Hall, 8 Cir., 76 F. 2d 258, 263), was it reversible error for the court below to refuse an investigation of the special master-referee's "bargaining" privately for his fee with the attorney of the defendant exculpated by his report because the report had long before been submitted?

Is such an exception to the rule against a special master "bargaining" for a higher fee with the attorney for a party for whom he has made a favorable report consistent with the high standard of conduct required of federal masters under Rule 53(a) of the Federal Rules of Civil Procedure where the Court of Appeals found "that the evidence did not compel the (favorable) result" to the defendant whose attorney was approached?

8. Where after rendering favorable reports exculpating the chief defendant in the federal and state courts, a federal court special master and state court referee, admittedly made an off-the-record ex parte demand of the defendant's attorney for a fee of $25,000 in excess of a proffered $100,000, the attorney consented thereto, and the Court of Appeals subsequently found "that the evidence did not compel the (favorable)

result" to the defendant "reached by Fitzsimmons" (the referee-master) and that there was "highly questionable conduct" by the defendant who had been exculpated, and that there was "impropriety" in "letting the state court set the (federal) Special Master's fee"

(a) May the Special Master retain his fee without application to the district court, as required by Rule 53(a) of the Federal Rules of Civil Procedure, on the grounds of res judicata where plaintiffs had no notice of the state court proceedings and where their representation was inadequate since the attorney representing the corporation was the nominee of the chief defendant and the issue of exclusive jurisdiction under Rule 53(a) in the federal court was not raised?

(b) Where a contemporaneous memorandum quotes the corporation's attorney as having disclosed to an affiant that the federal special master secretly visited the attorney and demanded $25,000 in excess of a proffered fee of $100,000 for "special services" consisting of the referee-master's "general perspective toward the whole case" and the

fact he "fell over backwards" when "there were cries for Kirby's testimony;" that he "strained" to let Kirby off, and "to say the least," took a "very charitable attitude toward the IDS transaction", and the special master and attorney admit the visit but deny the content of the conversation by affidavit, was it reversible error for the Court of Appeals to deny petitioners the right to examine the federal special master and the attorney under oath?

9. After proving the secret off-the-record ex parte visits by the federal special master to the corporation and chief defendant's attorneys respecting his fee, was it necessary for the petitioners to prove the contents of the conversations in order to set aside the judgment founded on the referee-master's reports exculpating the chief defendant? Or was not the proof that such visits had been made sufficient under the "Caesar's wife rule" relating to the conduct of referees and masters to bar giving res judicata effect to judgments based on the confirmation of the referee-master's reports? *

* "Caesar demanded that his wife should not only be virtuous, but beyond suspicion. The people should not exact less from the judiciary, the most powerful branch of our government." People ex rel. Union Bag & Paper Co. v. Gilbert, 256 N. Y. S. 442, 444, aff'd 236 App. Div. 873.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Art. III, Sec. 2

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and * * * to controversies * * * between citizens of different states * * * ."

Judicial Code of the United States

§ 46. Assignment of judges; divisions; hearings; quorum

* * * * * * * * * *

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof. As amended Nov. 13, 1963, Pub.L. 88-176, § 1(b), 77 Stat. 331.

* * * * * * * * * *

§ 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 102, 63 Stat. 104.

Rule 53(a), Federal Rules of Civil Procedure

"Masters.

(a) *Appointment and Compensation.*

• • • the court in which any action is pending may appoint a special master therein. • • • The compensation to be allowed a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. • • • "

PRIOR PROCEEDINGS IN THIS COURT

This Court in Holt v. Kirby, 384 U. S. 28 (1966), after granting writs of certiorari to review the en banc judgment in Alleghany Corporation v. Kirby, 340 F. 2d 311 (2 Cir. 1965) dismissed the writs as improvidently granted, pursuant to a 4-3 decision.

The proceedings hereinafter referred to were subsequently instituted in the Court of Appeals.

STATEMENT OF THE CASE

1. The 3-judge panel decision of appeals and of motions to vacate a judgment entered by 8 judges sitting in banc under 28 U. S. C. A. 46(c)

On April 17, 1967 petitioners filed an application in the United States Court of Appeals for the Second Circuit for an order directing petitioners Smith and Wiener to conduct an investigation to aid the court in determining whether its judgment in Alleghany Corporation v. Allan P. Kirby et al., 340 F. 2d 311 (2 Cir. in banc) was procured by fraud.

On February 8, 1968 petitioners filed a motion in the Court of Appeals to vacate the in banc judgment on the ground that the proof tendered by affidavits in support thereof showed the in banc judgment affirming the judgment of the district court in dismissing the complaint (218 F. Supp. 164) had been procured by fraud.

Notwithstanding that the motions sought a vacatur of a judgment entered by an 8 judge in banc court, a 3-judge panel without referring the motions to the in banc court and with no stated authority in any statute or court rule denied the motions on May 8, 1968.

On the same day and in the same opinion the 3-judge panel affirmed dismissal of the complaint in Smith v. Fitzsimmons et al., a civil action which also sought a vacatur, among other relief, of the in banc judgment in Alleghany Corp. v. Kirby. In addition to

filing the Smith complaint, petitioners Smith and Wiener moved in the district court for a vacatur of the decision and judgment in the Alleghany case on the ground that by the time it was decided in the Court of Appeals the defendant-appellees Kirby had acquired control of the plaintiff-appellant Alleghany Corporation. Petitioners contended that by reason of this fact the Court of Appeals in rendering its in banc judgment lacked Constitutional jurisdiction since there was no "case" or "controversy" at the time of entry of judgment within the meaning of Article 3, Sec. 2 of the Constitution of the United States. The May 8, 1968 opinion of the 3-judge panel of the Court of Appeals also affirmed the denial of this motion by the district court.

On May 22, 1968 petitioners filed in the Court of Appeals a motion to vacate the judgment and opinion of May 8, 1968 for lack of jurisdiction in the 3-judge panel that decided the motions and appeals. Petitioners contended that under Sections 46(c) and 2071 of Title 28, U. S. C. A., and Rules 19(c) and 25 of the Rules of the Court of Appeals, the 3-judge panel lacked jurisdiction to determine whether or not a judgment entered in by an 8-judge in banc court should be vacated either for fraud upon that court or lack of Constitutional jurisdiction in that court.

By order dated June 5, 1968 the 3-judge panel denied the motion to vacate without opinion. At the same time it denied an application for extension of time to file a petition for rehearing.

2. **The 3-judge panel decision that the 8-judge in banc court had Constitutional jurisdiction at the time of entry of judgment and that the issue was res judicata, although the appellees Kirby had acquired control of the appellant Alleghany Corporation and the issue was not litigated.**

After holding that the Court need not resolve a procedural point as to which Court - appellate or district - a motion to vacate the appellate judgment should have been made in, Judge Smith stated:

> Appellants' second point goes to the merits—it is that this court lost jurisdiction of *Alleghany* v. *Kirby* when the Kirby forces regained control of Alleghany, because there was no longer a justiciable controversy. However, the case heavily relied upon by appellants—*South Spring, supra*—involved a situation where the corporate litigants had both come under control of the same persons *before* oral argument, and it seemed clear that the controlling persons were, in effect, asking the Supreme Court for advice on how certain minority interests should be treated. Here, the situation was very different, for *Alleghany Corporation* v. *Kirby* was vigorously argued to this court by attorneys clearly representing adverse parties, and the Kirby takeover had no effect on the posture of the case as it was submitted to the court for decision. The only effect the takeover might have had would be on the submission on the reconsideration *in banc*, and on the decision not to seek review on certiorari. Be that as it may, the three-judge panel had jurisdiction, at least. Moreover, this court's determination, implicit in its decision, that there was a

justiciable controversy is *res judicata*, and not open to collateral attack. *Swift & Company* v. *United States*, 276 U. S. 311, 326 (1928). Cf. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940). Appellants contend that there was no adjudication of the constitutional "justiciable controversy" issue because the issue was not brought specifically to this court's attention. But the issue *might* have been raised, and that is what is crucial. See *Chicot County Drainage District* v. *Baxter State Bank*, *supra*. The failure to seek certiorari, suspect though it may be (see Judge Hays' dissent in 344 F. 2d at 575), was cured by the Court's grant of certiorari on the application of the intervenors. There is no indication that the later dismissal of certiorari was on the ground that procedurally the case was not properly before the Court. The ruling of Judge Weinfeld that the determination was not open to collateral attack was correct.[3]

In neither of the two cases relied on by the Court of Appeals did the appellees acquire control of the appellant prior to entry of the judgment.

In both cases, also, the attack on jurisdiction came from persons who had actual notice of the case prior to judgment or who were parties to it. The record herein shows that neither petitioner Smith nor petitioner Wiener had any notice of Alleghany Corporation v. Kirby until more than a year after the entry of the in banc judgment.

As early as South Spring Gold Co. v. Amador Gold Co., 145 U. S. 300 (1892) this Court refused to determine an appeal after being advised that the control of both parties to the suit - each a corporation - had come into the hands of the same persons. This Court decided that the appropriate remedy was to vacate the judgment below, and in a long line of cases cited in Aetna Life Insurance Co. v. Haworth, 300 U. S. 227, 240-241; United States v. Munsingwear, 340 U. S. 36, 39-40; and Poe v. Ullman, 367 U. S. 497, 505 this Court has followed that rule.

At no time was this question submitted to nor determined by the Court of Appeals, and we submit that the 3-judge panel erred not only in failing to refer it to the 8-judge in banc Court but in resolving that it had been "implicit in its decision" that the South Spring Gold Co. rule did not apply. There is absolutely no language either in the in banc or panel decisions (333 F. 2d 327; 340 F. 2d 311) upon which to base a finding of "implicit" decision. Nor has any citation been made of any authority which bars on res judicata grounds a person from attacking a judgment affecting his interests when he had no notice of the action prior to entry of judgment.

3. The pyramid of fraud by Kirby and Alleghany Corporation against the minority stockholders and upon the courts uncovered by 14-years of painstaking and laborious activities of the minority stockholders

(i) In May, 1950 Allan P. Kirby and Robert R. Young as President and Chairman of Alleghany Corporation discovered that the "projected 1950 income before taxes or capital transactions amounted to $20 for each IDS (Investors Diversified Services, Inc.) share" of capital stock. They thereupon "acquired for $8.15 from Alleghany in the exchange transaction" a total of 48,125 IDS shares. (333 F. 2d 327.

(ii) Prior thereto they secured the ratification of the exchange transaction by the Alleghany shareholders by means of proxy material which failed to disclose the $20 per share IDS projection. (333 F. 2d at 333-334)

(iii) By 1955 Kirby and Young had $15,000,000 profit (now at least $84,000,000) on the transaction.

(iv) Thereupon, after being sued in the federal and state courts by minority stockholders upon this and other transactions, they agreed to settle all the claims for $1,000,000 cash, without disclosing the $20 per share projection.

(v) Robert J. Fitzsimmons, a respondent herein as defendant-appellee, was named as state court referee and federal special master.

(vi) Thereafter in November, 1958 referee-master Fitzsimmons in integrated reports filed in both courts, federal and state, recommended approval of the $1,000,000 cash settlement. Subsequently decrees were entered in both courts approving in effect the joint settlement after minority stockholders' counsel had objected successfully to Judge Dimock against the confirmation of the reports and compelled Kirby and the Young Estate to increase the cash settlement by $2,000,000 more than the sum approved by the referee-master, or a total of $3,000,000. (333 F. 2d 327)

(vii) The 1960 orders of approval came under attack in 1962 when Alleghany Corporation under new control of the Murchisons amended a complaint in Alleghany Corporation v. Kirby so as to plead that documents material to the settlement of the 1950 transaction had been concealed by Kirby from Referee Fitzsimmons.

(viii) The district court dismissed the complaint on the ground that the state court judgment confirming the referee's report was res judicata of the issue. Alleghany Corporation v. Kirby, 218 F. Supp. 164.

(ix) Upon appeal the Court of Appeals panel divided 2-1 and upon rehearing in banc the court affirmed by 4-4 vote the dismissal of the complaint. (333 F. 2d 327; 340 F. 2d 311) This Court

granted petitions for writs of certiorari and then by a 4-3 vote (Justices Black, Harlan & White dissenting) dismissed them as improvidently granted after Kirby's counsel had argued the absence of a substantial federal question. (Holt v. Kirby, 384 U. S. 28)

(x) In July, 1966 two Alleghany minority stockholders Morris Smith and David Wiener (petitioners herein) filed Smith v. Fitzsimmons, Kirby & Alleghany Corporation, 66 Civil Action 1638 in the district court for the southern district of New York, alleging that federal special master Fitzsimmons had unlawfully obtained his fee for services as master under Rule 53(a), F. R. C. P. by application and order of approval in the state court; that he had entered into a conspiracy with Kirby and Alleghany to defraud the minority shareholders of his impartial judicial services and had received in payment thereof $125,000 from Alleghany by an unopposed, unappealed from order of the state court awarding him that amount after secret ex parte conversations with Kirby's attorney; and that the judgment of the Court of Appeals in Alleghany Corporation v. Kirby, 340 F. 2d 311 (in banc) had been procured by fraud upon the court because it was based on a judgment confirming his reports as special master and referee without disclosure to the court of his conspiracy with Kirby and Alleghany Corporation. The complaint sought rescission of the $125,000 "fee" of Fitzsimmons, an accounting by Kirby and vacatur of the in banc judgment.

By order entered March 1, 1967 the district court granted defendants' motions for summary judgment dismissing the complaint. In so doing it accepted defendants' affidavit denials and refused plaintiffs request for depositions.

The fraudulent conduct of referee-master Fitzsimmons as shown in the present record. (R. 278-342)

(i) he approved settlement of claims against Kirby and Young exceeding some $15,000,000 for only $1,000,000. Only by opposing his reports in the federal court were the minority stockholders able to increase the settlement to $3,000,000 cash.

(ii) the Court of Appeals judges, both those affirming the original dismissal and those dissenting, found that Fitzsimmons' exculpation of Young and Kirby was contrary both to the law and the evidence.

(iii) the appellate judges found that the 1950 IDS exchange transaction whitewashed by Fitzsimmons "violated fundamental legal principles against self-dealing", "that the proxy statement on the basis of which the stockholder ratification was sought was misleading" after Fitzsimmons found to the contrary; and "There certainly was enough evidence to justify a rejection (by Fitzsimmons) of the proposed settlement." (333 F. 2d 333, 334)

(iv) the sworn statement of counsel for petitioners - a member of the bar for some 40 years - that the court reporter who took the dictation for and typed the referee's report had informed another "member of the bar of this Court" that Kirby's attorney had written the report. The Court of Appeals

refused to give petitioners the power of subpoena so as to obtain this testimony of the member of the bar in question nor to test the affidavit denial of the court reporter. The court did this on the erroneous ground that there had been "litigation of the same issues" in the district court in the Smith v. Fitzsimmons case when that court had not been presented with any affidavits because of the rule that affidavits in support of a proceeding to reopen for fraud a judgment that had been affirmed must first be offered in the appellate court that affirmed the judgment. Hazel-Atlas Co. v. Hartford Empire Co., 322 U. S. 238, 249, note 5; In re Potts, 166 U. S. 263; Hartman v. Lauchli, (8 Cir.), 304 F. 2d 431, 432-433; and Goldwyn Pictures Corp. v. Howell Sales Co., (2 Cir.) 287 F. 100.

(v) A bill submitted by the court reporter, prior to the filing of the referee-master's reports, to Alleghany Corporation, attention of David W. Wallace, Esq., dated July 31, 1956, "Re: REPORT OF REFEREE FITZSIMMONS To preparing and typing services, rough draft of report of the Referee, Hon. Robert J. Fitzsimmons (dictation not complete) * * * $461.70." (R. 278, Exhibit "B", p. 2). Alleghany was then under control of Kirby and favored the settlment approved by the referee-master.

Judge Smith in his decision below states: "The claim is, of course that Schwartz (the court reporter) had submitted the bill to those to whom he had rendered the services, and that this indicates that somebody other than Fitzsimmons had dictated the report. Both Fitzsimmons and Daly (a Kirby lawyer) deny (by affidavits) the allegation. Schwartz states that

the report was dictated to him by John Mooney, an attorney from Fitzsimmons' office, and that it was in accord with the customary practice of his office in protracted reference proceedings to bill Alleghany during the course of the proceedings before Fitzsimmons (they had billed Alleghany and were paid by Alleghany for the transcript of the proceedings)." But the Court of Appeals refused to allow petitioners to examine the court reporter or Mooney, the alleged author of the Fitzsimmons report or Fitzsimmons or any Kirby attorney under oath with respect to this extraordinary bill. * It adhered to the erroneous position, contra to its own decision in Goldwyn, supra, that petitioners should have offered the evidence first in the district court instead of the Court of Appeals although it was offered in support of the motion to vacate the in banc Court of Appeals decision.

(vi) Under date of April 26, 1960 Alleghany's attorney Ireland, a Kirby appointee, wrote Kirby in Florence, Italy, that "Referee Fitzsimmons came to see me last Friday to ask if we would have any objection to his submitting his bill to the court for approval prior to the time all of the plaintiffs' counsel submitted their applications.* * * * it might be better if we cheerfully agreed to this in the interest of possible important relations. *** " ** (emphasis and notes supplied)

* The prior payment of a referee's fee was explicitly disapproved by the Appellate Division in Marine Midland Tr. Co. v. 40 Wall Street, 213 N. Y. S. 2d 689, 697.

** Minority stockholder Bohlenbach was opposing the settlement. Zenn v. Anzalone, 11 App. Div. 2d 939.

(vii) Alleghany under Kirby's control agreed to giving referee-master Fitzsimmons priority in his fee application, and on May 3, 1960 he applied in the state court without application to or order by the federal court for a fee of $150,000 for his "services" as federal special master and state court referee, or more than 20% of the $700,000 cash settlement which resulted in the orders appointing him referee-master, or 15% of the $1,000,000 cash settlement approved in "his" reports. Petitioner has been able to find no reported case in which a referee or master was awarded as here a sum ($125,000) as high as 12% of the cash value of a reference.

(viii) On May 31, 1966 in another litigation not before this Court, Alleghany's attorney Ireland admitted under oath that referee-master Fitzsimmons privately visited him at his office with respect to his fee application but he could not recall the discussion.

(ix) By affidavit sworn to October 19, 1966 referee-master Fitzsimmons admitted a visit privately to attorney Ireland respecting his fee application, after it was publicly filed, but contended he merely sought to suggest that the corporation "file an affidavit with the Court indicating what it considered to be the value of my services."

(x) By affidavit sworn to April 17, 1967 Randolph Phillips, an Alleghany consultant at the time of the 1960 fee application, appended copies of memoranda he had made on June 8, 9 & 10, 1960 of conversations with Alleghany's

attorney Ireland in which referee-master Fitzsimmons demanded $25,000 more than a fee of $100,000 "proffered" by Kirby's attorney Robert M. Loeffler, in which Fitzsimmons stated he had rendered "special services" to Kirby in his "general perspective to the whole case" and "to say the least I fell over backwards when there were cries for Kirby's testimony. Frankly, the Graubard witnesses were so much better than the other witnesses, that I strained to let him off. To say the least, taken a very charitable view toward the IDS transaction. Said been contacted by friends of APK (Allan P. Kirby), $125,000 agreed. Offered to be helpful in any future matter. (Judge) Owen McGivern is not noted for generousity at least compared to some other judges."

(xi) Ireland denied by affidavit sworn to November 29, 1967 that he had made the above admissions to Phillips, but he admitted he had "one meeting with Mr. Fitzsimmons at my office pursuant to a previous appointment made by him."

(xii) By affidavit sworn to October 19, 1966 Fitzsimmons alleged "I had no further contact with Mr. Ireland" than the meeting referred to in (ix) above, and by affidavit sworn to November 14, 1967 he denied he had made the statements to Ireland set forth in (x) above.

(xiii) On its erroneous view of the law that the memoranda set forth in (x) above should

have first been offered in the district court, instead of the Court of Appeals whose panel and in banc decisions rested on the integrity of the referee's report as a disinterested judicial official. As shown by the cases cited it was the obligation of petitioners first to file their proof in the court of appeals that affirmed the judgment at issue, especially where a vacatur of the court of appeals' own judgment is being sought.

(xiv) By affidavit sworn to in the Court of Appeals on November 14, 1967 Kirby's attorney Robert M. Loeffler admitted that Fitzsimmons in a private meeting with him had demanded $25,000 more than a $100,000 fee proffered him off-the-record by Alleghany's counsel for his "services" as referee-master. Judge Smith totally omits from his opinion below that Fitzsimmons met with Loeffler. Loeffler's affidavit states: "Justice McGivern then telephoned Mr. Fitzsimmons and informed him of my view that $150,000 was high, and Mr. Fitzsimmons took issue with my view and reaffirmed his request for $150,000. It is my recollection that Mr. Fitzsimmons came to Mr. Justice McGivern's chambers after the telephone call while I was still there and we met very briefly on that occasion. After I was advised of Mr. Fitzsimmons' position * * * I discussed my recommendation and Mr. Fitzsimmons' opposition with Mr. Ireland, and he subsequently authorized me to offer a fee of not more than $125,000. Accordingly, I telephoned Justice McGivern and so informed him. Shortly thereafter, Justice McGivern telephoned me that he

would enter an order to that effect." At no point did Mr. Justice McGivern, the state judge, confirm this explanation. And the Court of Appeals, before whom the affidavit was filed, refused to allow petitioners to examine into the affidavit's allegations, although it is clear it confirms substantial elements of the Phillips memoranda, including the proffer of $100,000 and the demand for $25,000 more by the referee-master.

(xv) Fitzsimmons in his affidavits in the district court - inquiry into which by examination under oath was barred - and in the Court of Appeals failed at all times to mention his meeting with Loeffler.

(xvi) "The practice of masters approaching litigants' attorneys and bargaining with them for fees is not consistent with the proper administration of the office and should not be sanctioned." (Universal Oil Products Co. v. Hall, 8 Cir., 76 F. 2d 258, 263, citing numerous state and federal decisions. The courts below failed to measure the facts by this rule, and the appellate court held that since the "bargaining" was long after the referee-master's report was filed it would not order an investigation although it indictated the result would have been different if the "bargaining" took place before the filing. This is an erroneous application of the "Caesar's wife rule" for judicial officials: it only means that "bargaining" before filing appears to solicit a bribe from the party to be favored in the report, while "bargaining" after filing the report with the party favored is akin to soliciting a "payoff". It was error

therefore for the court below to restrict the "Caesar's wife rule" for special masters and referees to the prior case and not the latter. On the admitted facts, the court below should have applied the rule of the Universal Oil Products case and it was error not so to do.

(xvii) Once a special master has admitted meeting with the attorney for the party on behalf of whom an exculpatory report has been made, it should not be necessary for the moving party to prove the substance of the off-the-record secret conversation. The mere fact of such an improper meeting, especially when both the corporation's attorney and the attorney for the exculpated defendant admit the subject matter was the referee-master's fee, should be sufficient to set aside the judgment based on the referee-master's report as well as the order awarding him his fee as federal master. Any other application of Rule 53(a) of the Federal Rules of Civil Procedure respecting master's, their fees and reports, weakens high standards for the administration of justice in the federal courts.

The basis of federal jurisdiction below

In Smith v. Fitzsimmons the basis was Rule 53(a), F. R. C. P. and diversity, as to first count; ancillary jurisdiction was alleged as to the other counts based on the earlier case of Alleghany Corp. v. Kirby, 218 F. Supp. 164.

4. Since under Rule 53(a) of the Federal Rules of Civil Procedure the district court has exclusive jurisdiction to fix the fee of special master, it was error for the 3-judge panel to rule that the award of the fee by the state court was res judicata when the issue had never been raised in the state court, no notice had been given of the fee application to the minority stockholders, including the plaintiffs herein, and the corporation paying the fee was under the control of defendant Kirby and was represented not by independent counsel but by Kirby's appointee.

The first count in Smith v. Fitzsimmons et al., USDC SDNY, 66 Civil 1638, alleged that Robert J. Fitzsimmons had improperly obtained in the state court his fee as special master in the federal court for services in Breswick & Co. v. Briggs. Upon the admitted facts that he had applied for his federal special master's fee in the state court and that Alleghany Corporation represented by defendant Kirby's counsel had made no objection had made no objection thereto or to the order awarding him $125,000 as fee for his "services" in the federal case as special master and as referee in the related case of Zenn v. Anzalone, plaintiffs moved for summary judgment requiring Fitzsimmons to repay his fee to Alleghany.

The district court denied the motion, holding it barred on grounds of res judicata, and the Court of Appeals affirmed. Rule 53(a), F. R. C. P. vests exclusive jurisdiction in the district court to fix the special master's fee and to

and to select the party to be charged. Both of these protections were denied petitioners Smith and Wiener who, as minority shareholders, had received neither notice of the action or of the fee application. In addition their representation in the state court by the corporation, which consented to and paid the fee without objection or appeal, was inadequate since counsel for the corporation were also Kirby's counsel and yet they made no contention he should be charged with the fee as the chief tortfeasor.

Thus the Court of Appeals was in error in affirming the first count's dismissal on res judicata grounds based on Stella v. Kaiser, 218 F. 2d 64, 65 (2 Cir. 1954, dictum). In that case the objecting stockholders both had prior notice and had appeared in the action. Here neither was the case. Furthermore, exclusive federal jurisdiction over the subject matter, here the special master's fee application, has never been deemed by this Court to be waived when it has not been actually litigated in the state court. The court below failed to cite any authority of this Court for its unique holding.

REASONS FOR GRANTING THE WRIT

I.

The assumption of jurisdiction by a 3-judge panel over appeals and motions to vacate a judgment in an appeal "heard and determined", pursuant to Section 46(c) of Title 28, U. S. C. A., by an 8-judge in banc Court of Appeals, constitues an impairment of the in banc jurisdiction of the appellate court without authority in any statute of Congress, rule of court, or reported case. This is an important question of federal law which if not settled by this Court by reversal will affect the in banc jurisdiction of all courts of appeal.

II.

In failing to vacate the in banc judgment entered in Alleghany Corporation v. Kirby, 340 F. 2d 311, assuming the 3-judge panel had jurisdiction, because of the prior acquisition

of control of the plaintiff-appellant by the defendant-appellee, the court below decided an important question of federal jurisdiction under the "case" or "controversy" clause of the Constitution of the United States, Art. 3, Sec. 2 contrary to the long-established decisional law of this Court. South Spring Gold Co. v. Amador Gold Co., 145 U. S. 300; Mills v. Green, 159 U. S. 651, 654; Aetna Life Insurance Co. v. Haworth, 300 U. S. 227, 240-241; Poe v. Ullman, 367 U. S. 497, 505, and cases cited therein.

III.

In barring an attack on the in banc judgment for lack of Constitutional jurisdiction under Art. 3, Sec. 2 on res judicata grounds of an "implicit" determination and "might have been

raised" character, the court below invoked a rule contrary to the long-established federal rule that a judgment may be attacked for lack of jurisdiction when the issue has not been submitted to and determined by a court and by a person who had no notice of and was not a party to the judgment.* The two cases cited by the court below are not in point: in neither had appellee acquired control of appellant, in neither was the attack made by a stranger to the action, and in both an attack was sought to be made by a party to the judgment or by persons with notice thereof.

* The record is barren of any proof that petitioners Smith and Wiener ever received any notice of Alleghany v. Kirby prior to entry of the Court of Appeals' judgment.

IV.

The decision below conflicts with the rule of procedure prescribed by this Court and other circuit courts for seeking a vacatur of a judgment affirmed by a court of appeals. Petitioners filed their affidavits alleging fraud in procuring the appellate judgment in the court of appeals as required by Hazel-Atlas Co. v. Hartford Empire Co., 322 U. S. 238, 249, note 5; In re Potts, 166 U. S. 263; Hartman v. Lauchli (8 Cir.), 304 F. 2d 431, 432-433; and Goldwyn Pictures Corp. v. Howell Sales Co. (2 Cir.), 287 F. 100. The court below ignored its own decision in Goldwyn and ruled contrary to the above cases the affidavits should have been filed first in the district court. Nevertheless the court below recognized "It is the rule in most circuits that where the action which

the district court is asked to take under Rule 60(b) would disturb the judgment ordered by the appellate court's mandate, the district court lacks power to proceed until leave is obtained. 7 Moore, Federal Practice par. 60.30(2). This court has not yet decided whether the rule should be established in this circuit... We need not resolve this question here in view of our determination on the merits." (slip opinion, pp. 2145-2146 on jurisdictional issue). It then held on the fraud issues "All the matter ... was or could have been presented to Judge Bonsal (of the district court) and may not be held back and subsequently used as the basis for relitigation of the same issues (in the court of appeals)." (slip opinion, p. 2159) Thus by reason of following the Second Circuit's own decision in Goldwyn, supra, and "the rule

in most circuits" , petitioners have been deprived of trial of the fraud issue and of the credibility of the opposing affidavits despite the pyramid of fraud already revealed respecting the acts of the federal special master and the appropriation by defendant Kirby and Young of $15,000,000 in corporate securities (now worth $84,000,000).

V.

The decision of the court below in allowing the federal master to retain the fee granted him by the state court constitutes a decision of a federal question in conflict with the applicable decisions of this Court and in violation of the exclusive federal jurisdiction vested in the federal courts under Rule 53(a), F. R. C. P. The issue of jurisdiction was neither

submitted to nor determined by the state court and the "exclusive jurisdiction" of the federal court may not be waived. In re Gilbert, 276 U. S. 6; Newton v. Consolidated Gas Co., 259 U. S. 101; Moore's Federal Practice, Vol. 5, par. 53. 04(3). The failure "to make stern and searching inquiry into the facts and to inform itself fully what the conduct of its officer had been" violates the rule of those cases, as summarized in Universal Oil Products Co. v. Hall, (8 Cir.), 76 F. 2d 258, 264. The application of the bar of res judicata to plaintiffs when the issue of exclusive federal jurisdiction was neither submitted to nor decided by the state court and they had no notice of the proceedings conflicts with the rule of this Court in Hansberry v. Lee, 311 U. S. 32 and cases cited therein.

VI.

This case involves the standard of conduct to be applied to a federal special master appointed under Rule 53(a), F. R. C. P. If the rule of the court below is sustained that he can apply in a state court for his fee nor be deprived of it when he has been shown to have approached ex parte the attorney for the defendant whom he had favored in his reports and to have "bargained" with him secretly and successfully for the fee's increase by $25,000 over the $100,000 proffered, and if the rule can be sustained after the court of appeals has found that the referee-master's report was erroneous in fact and law in its exculpation of the defendant with whose attorney as well

as the corporation's attorney he clandestinely visited, then the standards of the administration of federal justice will have been substantially lowered.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 152, 153—September Term, 1967.

(Argued February 20, 1968 Decided May 8, 1968.)

Docket Nos. 31115, 31342, 28397

MORRIS SMITH and DAVID WIENER,

Applicant-Appellants,

—v.—

ALLEGHANY CORPORATION,

Plaintiff-Appellee,

ALLAN P. KIRBY, JR. and FRED M. KIRBY II as Guardians of the Property of ALLAN P. KIRBY; FRED M. KIRBY and CHARLES T. IRELAND, JR.,

Defendants-Appellees.

MORRIS SMITH and DAVID WIENER, individually and on their own behalf and that of all other shareholders of Alleghany Corporation similarly situated and derivatively on behalf of ALLEGHANY CORPORATION,

Plaintiffs-Appellants,

—v.—

ROBERT J. FITZSIMMONS; ALLAN P. KIRBY, JR. and FRED M. KIRBY II as Guardians of the Property of ALLAN P. KIRBY; and ALLEGHANY CORPORATION,

Defendants-Appellees.

ALLEGHANY CORPORATION,

Plaintiff-Appellant,

—v.—

ALLAN P. KIRBY, JR. and FRED M. KIRBY II as Guardians of the Property of ALLAN P. KIRBY, CHARLES T. IRELAND, JR. and FRED M. KIRBY,

Defendants-Appellees.

Before:

FRIENDLY and SMITH, *Circuit Judges,* and GIGNOUX, *District Judge.**

Appeal in No. 31115, *Smith, et al.* v. *Alleghany, et al.,* from an order of the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge,* denying motion to intervene in *Alleghany* v. *Kirby* and void the judgment. Affirmed.

Appeal in No. 31342, *Smith, et al.* v. *Fitzsimmons, et al.,* from judgment in the United States District Court for the Southern District of New York, Dudley Bonsal, *Judge,* denying plaintiffs' and granting defendants' motion for summary judgment in action for repayment of special master's fee. 264 F. Supp. 728 (1967). Affirmed.

Motions under Rule 19(c) in No. 28397 to set aside judgment in *Alleghany* v. *Kirby,* denied.

ROBERT L. BOBRICK, New York City, *for applicants-appellants Smith and Wiener.*

RANDOLPH PHILLIPS, New York City, *applicant pro se.*

* Of the District Court of Maine, sitting by designation.

JOHN E. TOBIN, New York City (Granville Whittlesey, Jr., Peter J. Gartland, Benjamin Vinar, and Donovan, Leisure, Newton & Irvine, New York City, on the brief), *for defendants-appellees Kirby and Ireland, Jr.*

VINCENT R. FITZPATRICK, New York City (Anthony F. Phillips, and Willkie, Farr, Gallagher, Walton & Fitzgibbon, New York City, on the brief), *for Alleghany Corp.*

SAMUEL N. GREENSPOON, New York City (Pollack, Greenspoon & Singer, New York City, on the brief), *for defendant-appellee Fitzsimmons.*

SMITH, *Circuit Judge*:

We have considered together an appeal in No. 31115, *Smith, et al.* v. *Alleghany, et al.*, an appeal in No. 31342, *Smith, et al.* v. *Fitzsimmons, et al.*, and motions to set aside the judgment in No. 28397, *Alleghany* v. *Kirby*, entitled as motions under Rule 19(c). We find no error on the appeals and affirm in both cases. We deny the motions.

Nos. 31115 ("Smith v. Alleghany") and 31342 ("Smith v. Fitzsimmons"), and the motion in No. 28397 ("Alleghany v. Kirby"), are attempts to revive the litigation which grew out of a 1949-50 self-dealing transaction by four of the directors of Alleghany Corporation ("Alleghany").

In 1949, Alleghany acquired 85% of the voting stock, and 48,000 shares of "class A" common stock, of Investors Diversified Services (IDS), a highly leveraged investment company (and investment advisor to a large mutual fund complex). In December 1949, it was resolved at a meeting of Alleghany's board of directors that Alleghany offer to its officer-directors the opportunity to acquire "class A"

IDS stock in exchange for Alleghany preferred stock. After shareholder approval, Alleghany on May 15, 1950 transferred 48,125 shares of IDS "class A" common to Allan P. Kirby and Robert R. Young (president and chairman of the board, respectively, and both directors) in exchange for 4,840 shares of Alleghany preferred. The IDS stock was transferred at a price of $8.1453 a share, and by 1954 its price had advanced to about $200.00 a share.

Numerous derivative actions, based upon the alleged illegality of the above transaction, as well as alleged irregularities in other transactions, were brought on behalf of Alleghany against various of its officers and directors (including Kirby, Young, and Clint W. Murchison, Jr. and John D. Murchison) in 1954. Ten such actions were consolidated in the New York courts under the title of *Zenn* v. *Anzalone* ("Zenn"). Ten more were consolidated in United States District Court (Southern District of New York) under the same title. [The latter action, according to the affidavit of Benjamin Vinar (Donovan, Leisure, Newton & Irvine), was dismissed for lack of prosecution on August 9, 1966. See Appendix for Kirbys in No. 31342, p. 41A.] Although Kirby was made a defendant in both actions, he was served only in the federal one.

Another derivative action on behalf of Alleghany, entitled *Breswick* v. *Briggs,* was commenced in United States District Court (Southern District of New York) on February 14, 1955. Randolph Phillips was retained as a consultant to the plaintiffs' attorney in the *Breswick* action.

Negotiations between Abraham L. Pomerantz (attorney for the plaintiffs in both the state and federal *Zenn* actions) and representatives of the defendant officers and directors resulted in April 1955 in a tentative settlement of *all* claims asserted in *any* pending derivative action involving Alle-

ghany. The consideration was to be $700,000 cash paid by the defendants to Alleghany, plus the revision in favor of Alleghany of certain loss guarantees issued by the Murchisons in connection with certain joint ventures.

Upon application by Alleghany in the New York Supreme Court for approval of the settlement, that court appointed Robert J. Fitzsimmons as Referee, directing him to inquire into the "fairness, reasonableness and adequacy" of the stipulation of settlement. Notice of the terms of the proposed settlement was mailed to all Alleghany stockholders, and one Samuel R. Rosen, a stockholder represented by the law firm of Graubard & Moskovitz, appeared as an objectant to the settlement. Randolph Phillips served as a consultant to Graubard, and worked with him and Rosen in opposing the settlement in hearings which commenced before Fitzsimmons on September 19, 1955 and continued until January 1956. Kirby was excused from appearing at those hearings by Fitzsimmons. (A doctor testified that appearing would endanger Kirby's life.)

Meanwhile, the attorneys in the *Breswick* action, asserting that their exclusion from the *Zenn* settlement negotiations had been unfair, brought a proceeding in United States District Court to enjoin the defendants in *Breswick* from interposing in that action "any defense based upon any judgment entered in any action other than this action pursuant to any agreement not negotiated with the [*Breswick*] plaintiffs or their attorneys." An injunction was granted, by order dated October 27, 1955.

At the conclusion of the hearings before Fitzsimmons, the *Breswick* defendants moved to vacate the injunction in their case, and after argument of the motion, Judge Walsh of the United States District Court suggested that settlement of the entire litigation be discussed between

plaintiffs and the defendants, who included Kirby. Negotiations followed, and led to an increase over the offer made in *Zenn*. But the *Breswick* plaintiffs still were not satisfied, and when the defendants again moved to vacate the injunction, the United States District Court appointed Fitzsimmons as Special Master to hear and report on the good faith of the *Breswick* settlement proposal. These hearings were held in October and November, 1956. Fitzsimmons submitted a report to the United States District Court on November 17, 1958 recommending that the injunctive order be vacated. On the same day he submitted a report to the New York Supreme Court recommending that the original stipulation of settlement in *Zenn*, as augmented by the additional settlement, be approved. (By the terms of the settlement as it stood at that time, defendants were to pay $1,000,000 cash to Alleghany; the loss guarantee was to be amended; and a transaction in which the Murchison brothers had obtained 130,000 shares of IDS voting common was to be reversed.)

The matter of confirming the reports was argued in both the state and federal courts. The objectant stockholder Rosen, in *Zenn*, presented three basic points relating to the 1949-1950 IDS transaction, all of which had, of course, also been presented to Fitzsimmons as Referee: (1) Kirby and Young, it was alleged, had possessed inside knowledge that the earnings of IDS would increase approximately 500% in 1950 alone; (2) the December 1949 directors' meeting was allegedly illegal; and (3) the directors had allegedly failed to disclose material facts, etc. to the stockholders in the proxy statement for the meeting at which the exchange was ratified.

Justice McGivern of the New York Supreme Court approved the settlement as recommended by Fitzsimmons on

March 9, 1959. *Zenn* v. *Anzalone*, 17 Misc. 2d 897, 191 N. Y. S. 2d 840. He noted that "this court is the beneficiary of a lucid, painstaking and comprehensive report of a Referee achieved after protracted hearings which more nearly resembled a trial on the merits than on the adequacy of the proposed settlement. • • • The Referee has concluded that . . . the amended offer of settlement constitutes a fair, reasonable and adequate basis for a settlement of this litigation . . . " 191 N. Y. S. 2d at 843-844. Justice McGivern stated, however, that no order could be entered upon his decision until after action by the United States District Court on the motion to vacate the injunction.

Judge Dimock of the United States District Court took a somewhat less favorable view of the suggested settlement; on September 22, 1959 he rejected Fitzsimmons' report as Special Master and referred the matter back to him for further hearings. Phillips, who had a hand in both the *Zenn* and *Breswick* actions, realized that Judge Dimock's order improved the plaintiffs' position considerably. He therefore got in touch with Charles T. Ireland, Jr., an attorney representing Alleghany and Kirby, and advised him that new hearings would now be held at which Kirby would have to testify. [Young had died on January 25, 1958, and Kirby had then become Chief Executive Officer and Chairman of the Board of Alleghany.] At the time, one Mr. Daly (of Lord, Day & Lord) was representing Alleghany and Kirby and the other defendants; Daly and Mr. Adams, who represented the Murchisons, were opposed to allowing Phillips to participate in the settlement discussions. Daly preferred to deal with Pomerantz, with whom the original $700,000 settlement had been worked out, but Graubard (who represented stockholder Rosen) objected to that. Daly apparently thought that further hearings

should be held, and that Kirby should testify. Meanwhile, dissension grew in the plaintiffs' ranks. Phillips managed to keep the pressure on Kirby, however, and Kirby inquired of Daly what his maximum liability might be. Daly's response, dated October 22, 1959, indicated that liability in connection with the IDS exchange transaction might cost Kirby $22,800,000, or, if he were held jointly liable, $39,350,000. Kirby then authorized Ireland to negotiate settlement terms with Phillips. [It is interesting to note, however, that Phillips' extra leverage was obtained by the federal court's refusal to approve the Special Master's report in the *Breswick* litigation, which did *not* involve the IDS exchange transaction.]

During the final settlement negotiations, in late 1959, Kirby decided to change attorneys (apparently as a result of Daly's failure to advise him as to whether he could settle individually). The firm of Donovan, Leisure, Newton and Irvine was substituted for Lord, Day & Lord, with the understanding that they would try to work out a settlement of Kirby's individual liability by the end of the year.

Intensive negotiations on December 19 and 20, 1959, produced a final settlement, under which Kirby agreed to make a payment of $1,100,000 in addition to his obligation under the $1,000,000 basic settlement earlier arrived at. On December 24, Judge Dimock was advised that the Young estate was willing to contribute an additional $900,000 to the basic settlement; accordingly, the *Breswick* plaintiffs agreed to the vacating of the 1955 injunction. The effect of the final settlement was that Alleghany would receive $3,000,000 from the various defendants, and that control of IDS would be returned to Alleghany from the Murchisons. The settlement was approved by the New York Supreme Court on December 28 and 29; between those

dates and May 1960, Alleghany issued releases to the defendants. A judgment dismissing the action on the merits as to all parties was entered in New York Supreme Court on June 21, 1960.

The order entered by Justice McGivern on December 29, 1959, approving the final settlement, provided that Fitzsimmons might apply to the New York Supreme Court for an allowance for his services both as Referee in that court and as Special Master in the United States District Court. Prior to making his fee application, Fitzsimmons spoke with Judge Dimock about the allowance for his services, and was told that he would not be required to proceed in the United States District Court with reference to fees for his services as Special Master. Fitzsimmons made application to the New York Supreme Court on May 16, 1960, for $150,000 compensation for his services as Referee and Special Master. In his affidavit submitted with the application, Fitzsimmons referred both to the amount of effort expended by him and to "the value of the ultimate settlement" in arriving at the $150,000 figure. The only party to the settlement which objected to that figure was Alleghany; Ireland, acting as its attorney, submitted a memorandum in which he pointed out that: "Applicant's compensation for services rendered as Referee and Special Master could in no wise depend upon the value of the recovery for the corporation; the Applicant would be entitled to compensation for his services had there been no recovery whatever for the corporation." The memorandum suggested that appropriate compensation for the maximum estimate of Fitzsimmons' time would be $115,000. Fitzsimmons subsequently met with Ireland at the latter's office, and suggested that Alleghany file an affidavit with the court indicating what it considered the value of the ser-

vices to be. Justice McGivern, by order dated June 10, 1960, fixed the fee at $125,000; it appears that before doing so he communicated with Alleghany and was advised by counsel that the sum would be acceptable.

We next come to what has been termed by Judge Friendly the "Willheim chapter" of the Alleghany Corporation—that chapter which takes us "through the proxy contest resulting in the victory of the Murchison brothers over Allan P. Kirby at the annual meeting of the stockholders of Alleghany Corporation in May 1961." See *Phillips* v. *S. E. C.*, —— F. 2d —— (2 Cir. slip opinion 1007, 1008, January 16, 1968). Simultaneously with the commencement of that proxy contest, the Murchisons, on September 8, 1960, brought a derivative action in the United States District Court for the Southern District of New York against Kirby, Phillips, Ireland, and six other defendants. The suit was brought on behalf of Alleghany, which was named as a nominal defendant. [After the Murchisons' victory in the proxy fight, Alleghany was substituted as party plaintiff, and the action was dismissed as to all defendants other than Kirby, Phillips, Ireland and Fred M. Kirby.]

The gravamen of the complaint, as amended, was in the allegation that there had been fraud in the obtaining of the settlements (and in the obtaining of the United States District Court order vacating the 1955 injunction in *Breswick*). The complaint focused upon Kirby, seeking *inter alia* the following relief: (1) That the December 24, 1959 stipulation of settlement in *Zenn*, and the December 24, order vacating the injunction in *Breswick* and approving a separate Kirby settlement in *Breswick*, be declared null and void (or, in the alternative, that Kirby be enjoined from pleading the orders, etc. as *res judicata*); (2) That the

order of the New York Supreme Court in *Zenn* approving a separate Kirby settlement be declared null and void (or that Kirby be enjoined from pleading it as *res judicata*); (3) (similar relief as to the judgments of the New York Supreme Court dismissing the complaint); (4) That all releases on behalf of Alleghany delivered to Kirby in *Breswick* or *Zenn* be rescinded; (5) That the 1949-50 transaction be rescinded, or that damages measured by the value of a rescission be awarded.

The essential allegations of fraud were: (1) a corrupt agreement whereby Kirby was enabled to settle for far less than he should have had to pay, and from which Phillips and Ireland personally benefited; and (2) failure by Kirby to adduce or cause to be adduced before the New York Supreme Court or the United States District Court, or before Fitzsimmons as Referee and Special Master, facts material to an evaluation of Kirby's liability on claims arising out of the 1949-50 IDS stock transaction and of the fairness of the settlements proposed.

The District Court, Judge Dawson, held that there was diversity of citizenship, and that given diversity the court had jurisdiction over an independent action to prevent Kirby from claiming the benefits of the settlement, citing *Marshall* v. *Holmes*, 141 U. S. 589 (1891).[1] Judge Dawson then found that it had not been established that there was a secret agreement made by Phillips for his own benefit, and that it had not been shown that Kirby had committed a

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1 *Marshall* v. *Holmes* involved a holding that federal courts have jurisdiction to enter orders prohibiting a party from enjoying the benefits of a state court judgment obtained by fraud. The continued validity of that proposition is at least questionable—see *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118, 136 (1941)—but any settlement fraud was perpetrated not only on the state court, but also on the United States District Court which vacated the injunction in *Breswick*, and that fact was enough to give the District Court jurisdiction.

fraud upon the State court or its Referee in failing to produce certain documents at the hearings. *Alleghany Corporation* v. *Kirby,* 218 F. Supp. 164 (S. D. N. Y. 1963).

Appeal by Alleghany to this court was limited to the claim that Kirby should have disclosed certain facts during the settlement negotiations. The judgment of the District Court was affirmed, *Alleghany Corporation* v. *Kirby,* 333 F. 2d 327 (2 Cir. 1964). Judge Moore's opinion for the court was based in part on the principle that a director, defendant in a derivative suit, is not bound to disclose on his own initiative everything which might be relevant, and in part on the holding that evidence, in order to justify setting aside a settlement, ought to be at least of the character required for a new trial. Judge Friendly, in dissent, argued that the usual fiduciary obligation of a director should continue in a situation where he is charged with self-dealing. He also pointed out that even though personal dereliction by Kirby might not have been shown, Kirby, Young and Purcell were in a "joint venture" of sorts, and it appeared that Young and Purcell (who both testified at the hearings) had permitted the Referee to pass upon the settlement when they should have been aware that crucial and damaging evidence was not before him. (The evidence tending to show this had been excluded by Judge Dawson.) The evidence not before the Referee consisted of schedules of projected IDS income; the evidence excluded by Judge Dawson consisted of a note from Purcell to Young indicating that the projections were probably seen by the Alleghany directors. If the projections were seen by them, that would diminish the strength of the directors' principal arguments in defense to the *Zenn* actions: that they hadn't known IDS earnings would increase so dramatically.

[Two days after oral argument to the three-judge panel, the Kirby group regained control of Alleghany.]

After the panel decision, Stuart N. Updike, who had been representing Alleghany, wrote a letter to Chief Judge Lumbard asking guidance with respect to his firm's responsibility to Alleghany and its minority stockholders in view of the fact that Kirby had regained control of the corporation. [He also called the court's attention to the case of *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300 (1892)—referred to further below.] Subsequently Updike appeared before the Alleghany Board of Directors and answered questions about the case, whereupon the Board authorized the firm to take whatever steps were necessary to apply for a rehearing of the panel decision, with the suggestion that the case be heard *in banc*. The case was heard *in banc*, and this court split four-four, the result being affirmance of the District Court judgment. *Alleghany Corporation* v. *Kirby*, 340 F. 2d 311 (2 Cir. 1965).

Subsequent to the *in banc* decision, the Alleghany Board consulted both the Updike firm and Willkie, Farr, Gallagher, Walton & FitzGibbon (who are still representing Alleghany—at least in these actions) with respect to the advisability of petitioning the Supreme Court for a writ of certiorari, and with respect to the directors' responsibility toward the shareholders in making that decision. The "independent" Board members voted unanimously not to authorize a petition for a writ of certiorari. As might be expected, Alleghany shareholders (Holt and McMahon) then applied to the United States District Court for leave to intervene as a matter of right for purposes of carrying the litigation to the Supreme Court. Their application was denied by Chief Judge Ryan, who noted among other things that they had watched the litigation closely from the outset,

but sought to intervene only on the eve of the deadline for filing a petition for a writ of certiorari. His action was affirmed by this court, Judge Hays dissenting on the ground that the Alleghany Board was probably under the influence of Kirby when it decided not to authorize a petition to the Supreme Court. *Alleghany Corporation* v. *Kirby*, 344 F. 2d 571 (2 Cir. 1965).

At this point the Supreme Court, perhaps not fully aware of what it was getting into, on petition of Holt and McMahon issued writs of certiorari to review both the decision on the merits and the decision denying Holt and McMahon the right to intervene. After oral argument, the writs were dismissed as improvidently granted *sub nom. Holt* v. *Kirby*, 384 U. S. 28 (1966). Mr. Justice Black dissented, stating that he would reverse the judgments substantially for the reasons stated in Judge Friendly's dissent; Mr. Justice Harlan and Mr. Justice White dissented, believing that the cases should be adjudicated on the merits. It may be a good guess that the writs were dismissed on the theory that since the state court judgment was based entirely on the common law (cf. 340 F. 2d 311, 312, n. 1), and the *Breswick* action in the federal court did not involve the IDS transaction, there were no federal issues in the case.

The foregoing summarization of the *Zenn*, *Breswick*, and *Alleghany* litigation brings us to the litigation now before the court.

No. 31115 Smith, et al. v. *Alleghany Corporation, et al.*

Judge Kaufman said, with respect to the application of Holt and McMahon to intervene in *Alleghany* v. *Kirby*, "The aspect of [Alleghany's] litigious history presently before us . . . may occupy no more than a footnote when the

definitive chronicle is written . . ." 344 F. 2d at 572. This case is, in a sense, a footnote to a footnote.

Smith, et al. moved in the United States District Court for the Southern District of New York to intervene in *Alleghany Corporation* v. *Kirby* and to void the judgment entered, principally on the ground that the resumption of corporate control by Kirby two days after oral argument before the three-judge panel of this court foreclosed any justiciable controversy between parties having adverse legal interest. Heavy reliance was placed upon *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300 (1892), in which the Supreme Court, being advised that before argument control of both parties (corporations both) to the suit had come into the hands of the same persons, remanded the case without passing on the merits. Judge Weinfeld, noting that this court had had notice that control over the corporation had shifted, and that the *South Spring* case had been specifically called to the court's attention, denied the application.

Two points are made on the appeal.[2] The first contention is that the District Court lacked jurisdiction to consider the motion which appellants brought before it (under Rule 60(b)) without obtaining leave from this court, which had affirmed the judgment. A motion to vacate Judge Weinfeld's decision for want of jurisdiction was denied below. It is the rule in most circuits that where the action which the district court is *asked to take* under Rule 60(b) would disturb the judgment ordered by the appellate court's mandate, the district court lacks power to proceed until leave is obtained. 7 Moore, Federal Practice ¶60.30[2]. This court has not yet decided whether the rule should be estab-

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2 Appellant lists them as four, but the last three all go to the same basic point.

lished in this circuit—Judge Clark was very strongly of the view that it should not. See, generally Judge Friendly's opinion in *Schildhaus* v. *Moe*, 335 F. 2d 529, 530 (2 Cir. 1964). We need not resolve the question here in view of our determination on the merits.

Appellants' second point goes to the merits—it is that this court lost jurisdiction of *Alleghany* v. *Kirby* when the Kirby forces regained control of Alleghany, because there was no longer a justiciable controversy. However, the case heavily relied upon by appellants—*South Spring, supra*—involved a situation where the corporate litigants had both come under control of the same persons *before* oral argument, and it seemed clear that the controlling persons were, in effect, asking the Supreme Court for advice on how certain minority interests should be treated. Here, the situation was very different, for *Alleghany Corporation* v. *Kirby* was vigorously argued to this court by attorneys clearly representing adverse parties, and the Kirby takeover had no effect on the posture of the case as it was submitted to the court for decision. The only effect the takeover might have had would be on the submission on the reconsideration *in banc*, and on the decision not to seek review on certiorari. Be that as it may, the three-judge panel had jurisdiction, at least. Moreover, this court's determination, implicit in its decision, that there was a justiciable controversy is *res judicata*, and not open to collateral attack. *Swift & Company* v. *United States*, 276 U. S. 311, 326 (1928). Cf. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940). Appellants contend that there was no adjudication of the constitutional "justiciable controversy" issue because the issue was not brought specifically to this court's attention. But the issue *might* have been raised, and that is what is crucial. See

Chicot County Drainage District v. *Baxter State Bank, supra.* The failure to seek certiorari, suspect though it may be (see Judge Hays' dissent in 344 F. 2d at 575), was cured by the Court's grant of certiorari on the application of the intervenors. There is no indication that the later dismissal of certiorari was on the ground that procedurally the case was not properly before the Court. The ruling of Judge Weinfeld that the determination was not open to collateral attack was correct.[3]

No. 31342 Smith, et al. v. *Fitzsimmons, et al.*

This is an appeal from a judgment in the District Court, Judge Bonsal, denying plaintiff-appellants' motion for summary judgment on the first count of their complaint, and granting defendants' motions for summary judgment. *Smith* v. *Fitzsimmons,* 264 F. Supp. 728 (S. D. N. Y. 1967).

Appellees raise the question of federal jurisdiction in the absence of complete diversity, two of the plaintiffs and Fitzsimmons being citizens of New York and there being no allegation that Alleghany does not have its principal place of business in New York. However, the second and third counts, attacking the judgments in federal court actions, may be rested on ancillary jurisdiction, 7 Moore Federal Practice ¶60.38, and the fourth, purportedly based on federal statutes, does not require diversity. The first count of the complaint seems to seek recovery only for the diverse plaintiff and we have no doubt that the district court would have permitted dismissal of this count as to the New York plaintiffs and if necessary a severance if sought. Moreover, the state law claim may well be retained even in the absence

3 Appellees also raise questions regarding appellants' status as intervenors and regarding the service of papers. We need not reach these questions.

of diversity as pendent to the second and third claims arising out of the same operative facts. *Hurn* v. *Oursler*, 289 U. S. 238 (1933); *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 722-25 (1966). We decline therefore to order dismissal of the first count at this stage for formal defect in allegations of diversity of the parties.

The first count of the complaint alleges that Fitzsimmons obtained his "compensation" for his services in *Breswick* in violation of Federal Rule 53(a), since he applied to the New York Supreme Court for compensation whereas Rule 53(a) provides: "The compensation to be allowed to a master shall be fixed by the court . . ." (meaning, presumably, the U. S. District Court). It is also alleged that the fee application was made while the *Zenn* orders were on appeal, by "collusion with Alleghany and Kirby," that Alleghany was improperly represented upon the fee application, and that Fitzsimmons made secret communications to Ireland (who acted as Alleghany's attorney on the fee application) in order to obtain the sum of $125,000 awarded as his fee for acting as Referee in *Zenn* and Special Master in *Breswick*.

The second count realleges count one and further alleges that Fitzsimmons violated §14 of the New York Judiciary Law in that he was "interested" in the matters at issue in *Zenn* and *Breswick*, and that Kirby's counsel wrote Fitzsimmons' Referee's report. (Excerpts from this court's decision in *Alleghany*—chiefly from Judge Friendly's dissent—are alleged to "show" that Fitzsimmons did not adequately discharge his duties as Referee insofar as the IDS transaction was concerned.)

The third count realleges the first two, and alleges Fitzsimmons' "hidden interest" in the outcome of *Zenn*—an openly avowed interest, plaintiffs claim. This is no differ-

ent from count two, except that it alleges a conspiracy among Fitzsimmons, Kirby and Alleghany. The fourth count alleges that all of the acts alleged in the prior counts constituted a conspiracy to deprive plaintiffs and all "absent shareholders" in *Zenn* of their rights under the 14th Amendment and 42 U. S. C. §§1983, 1985(2) and 1985(3) (the Reconstruction Civil Rights Acts). This last bizarre claim requires no discussion.

Appellants requested the following relief: (1) that Fitzsimmons be directed to repay to Alleghany $125,000, with interest; (2) that the 1950 IDS transaction be rescinded (or damages be assessed against Kirby, measured by the value of a rescission); (3) that the orders and releases of the New York Supreme Court in *Zenn* relating to Kirby and the IDS transaction be declared null and void; (4) that a judgment issue declaring that this court's judgment in *Alleghany* v. *Kirby,* and the District Court's judgment as it related to the IDS transaction, were procured by fraud and are null and void; (5) that Kirby be prohibited from participating as a stockholder in any recovery; (6) that an order issue declaring the continued existence of Alleghany to be against the interest of the public, the plaintiffs, and the minority stockholders; and (7) that Alleghany be dissolved.

So far as we can determine, in all this, appellants advance four basic claims: (1) it was improper for the state court to determine Fitzsimmons' fee for his services as Special Master rendered the U. S. District Court; (2) Fitzsimmons had a "hidden interest" in the outcome of *Zenn;* (3) there was collusion among Fitzsimmons, Alleghany and Kirby in the setting of Fitzsimmons' fee; and (4) Kirby's counsel wrote Fitzsimmons' report as Referee in *Zenn.*

(1) It appears that Judge Dimock intended that the New York Supreme Court take Fitzsimmons' services as Special Master into account in setting his overall fee, and that Fitzsimmons need not submit the fee to the federal court for consideration. Even in the peculiar circumstances of the interrelated *Zenn* and *Breswick* litigation, this would appear to be improper. Rule 53(a) F. R. C. P., provides: ". . . The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct . . ." See also 5 Moore, Federal Practice, ¶53.04(3) (2d ed. 1967).

The impropriety of letting the state court set the Special Master's fee is highlighted by the fact that Fitzsimmons' fee was paid entirely by Alleghany—the state court could not have required Kirby to pay any part of the fee, for Kirby had never been effectively made a party to the state litigation. (It appears to be assumed, however, that it was agreed among all of the parties that Alleghany should pay the fees.)

That the procedure by which Fitzsimmons' fee was set may have been improper does not mean, of course, that appellants can succeed now in obtaining any part of the fee back for Alleghany. Since the matter of Fitzsimmons' fee was submitted to the state court, and the parties in *Zenn* were free to object to the amount and to raise any issues pertaining to the fee award, the matter is now closed under the principle of *res judicata*. Appellants' reliance on *Hansberry* v. *Lee*, 311 U. S. 32 (1940) is misplaced, for the holding there was that where members of a purported class have potentially conflicting interests and are free either to challenge the alleged rights or to assert them, a judgment

in a suit brought by some members of the class will not be *res judicata* on the existence of those rights as to those class members not made parties to the litigation. The situation here, involving a stockholders' derivative suit, is very different, and is controlled by the rule that where the notice and representation are adequate a settlement decree in a derivative suit—a true class action—is *res judicata*. *Stella* v. *Kaiser*, 218 F. 2d 64, 65 (2 Cir. 1954) (dictum), cert. denied 350 U. S. 835 (1955). See also 3A Moore, Federal Practice, ¶23.11 (2d ed. 1967).

Appellants contend that since the error in allowing the state court to fix the fee can be characterized as lack of jurisdiction in the state court to take such an action, and the lack of jurisdiction was not raised as an issue in *Zenn*, *res judicata* is no bar. There is no question, however, but that the state court had jurisdiction of the subject matter and the parties in *Zenn;* moreover, this court has said that "With few exceptions a collateral attack upon the subject-matter jurisdiction of a court in which both parties have appeared is prohibited notwithstanding the failure of the parties to litigate the issue." *United States* v. *Eastport Steamship Corporation*, 255 F. 2d 795, 803 (2 Cir. 1958). Certainly a collateral attack on jurisdiction to set a master's fee should be even less favored than such an attack on jurisdiction over the subject matter of the litigation.

(2) Assuming that if Fitzsimmons had a "hidden interest" in *Zenn*, that would have violated Section 14 of the New York Judiciary Law (McKinney's Consol. Laws, c. 30) and would permit a collateral attack at this time both on the *Zenn* judgment and on the fee award, appellants' problem is that they offered no evidence in the District Court to show such a "hidden interest." A theory is offered that Fitzsimmons knew that if he rejected the settlement, the

amount of compensation he wanted would have been opposed by Alleghany under the control of Kirby. However, no evidence was offered to support this theory. So far as this point is concerned, then, summary judgment for the defendants was proper.

It may not be entirely clear from Judge Bonsal's opinion whether he was granting summary judgment under Rule 56 or dismissing the complaint under Rule 12. (There were motions under both rules.) As to the attack on Fitzsimmons' fee, it seems clear that there was a dismissal of the complaint, and this was certainly proper, since the issue was *res judicata* after the *Zenn* judgment. The problem arises with respect to allegations of Fitzsimmons' hidden interest, etc. Here the judge apparently ruled under Rule 56 and the judgment as to these allegations must be upheld under the Rule, since it appears that the parties had the opportunity to and did submit affidavits on the issues.

(3) The issue of "collusion" among Fitzsimmons, Kirby and Alleghany in the setting of Fitzsimmons' fee might not be *res judicata* before Judge Bonsal insofar as the allegations made by appellants differ from the grounds for attacking the fee already discussed under (1) *supra,* since Fitzsimmons was not a party in *Alleghany* v. *Kirby.* And the "collusion" theory, *if* supported by evidence, would at least raise the possibility not only of attacking the fee but also of attacking the *Zenn* judgment.

The allegations under the "collusion" theory center on the events of May and June 1960, surrounding the Fitzsimmons fee application. They are: (a) the fee application was filed before the rights of the litigants were finally determined; (b) Fitzsimmons selected Alleghany to pay his fee; (c) Fitzsimmons' visit to Ireland's office regarding the fee application was improper; and (d) the attorneys repre-

senting Alleghany on the fee application (the memorandum opposing the initial application was written by members of the Donovan firm, it is alleged) had a conflict of interest, in that they were Kirby's lawyers and thus were discouraged from contending that Kirby should pay part of Fitzsimmons' fee.

The problem with this theory, again, is the almost total absence of supporting evidence.

Substantiation of allegation c, relating to Fitzsimmons' visit to Ireland, might give color to the collusion theory, especially in light of a, b, and d. The claims seems to be that the visit was for the purpose of bargaining over the fee amount. Apparently recognizing that there was no evidence before the District Court on this point, appellants contend that the facts are shown in the record on what they characterize as "the Rule 19(c) application." But that record is not in this case, and it follows that summary judgment in the District Court on the pleadings and affidavits before it was proper.

(4) Once again, with the claim that Kirby's counsel wrote Fitzsimmons' report as Referee, there is no evidence whatever in the record substantiating the allegations. Summary judgment for defendants was proper.

There are two additional points raised to which we may give brief consideration. First, obviously there is no basis in the record to declare the continued existence of Alleghany against the public interest or to order its dissolution, even if the court in this action were thought to have the power in some manner to accomplish this. Second, although the appellees are undoubtedly correct in their thorough arguments as to the power of federal courts to tax attorneys' fees as costs against unsuccessful plaintiffs in some cases, it would seem clear that the decision whether or not

this be done rests within the discretion of the District Court, so far as the case before it was concerned. Cf. *Connecticut Importing Co.* v. *Frankfort Distilleries*, 101 F. 2d 79, 81 (2 Cir. 1939). In any case, given the nature and proportions of the consequences of the highly questionable conduct of the fiduciaries underlying the long and tortuous course of this litigation, we would not be inclined to penalize the efforts of plaintiffs here to exhaust all possible avenues of relief, in the District Court or on appeal.

No. 28397 Alleghany Corporation v. *Kirby, et al.*

Robert L. Bobrick (attorney for Smith and Wiener—see *Smith* v. *Fitzsimmons, supra*—who are here characterized as "applicants") and Randolph Phillips applied on April 17, 1967 to the original panel in *Alleghany* v. *Kirby* and to the court *in banc* for an order "under Rule 19(c)" directing Smith and Wiener to conduct an investigation to aid this court in determining whether its judgment in *Alleghany* v. *Kirby* was procured by fraud. On May 16, 1967 the panel (Judges Moore, Friendly and Kaufman) ordered that the motion be referred to the panel considering the appeal in *Smith* v. *Fitzsimmons*.

An investigation such as the applicants request would be—applicants hope—preparatory to a motion under Rule 60(b), F. R. C. P., which provides for relief from a final judgment where fraud has been shown. Rule 19(c) of this court is by now irrelevant, since it merely directs that a motion addressed to a previous decision of the court be referred to the judges rendering the previous decision, and that has been done. If it is not settled in this Circuit that a Rule 60(b) motion should be first made to the Court of Appeals, rather than to the District Court which rendered the judgment, then it is possible that this application for

a pre-motion investigation should have been made to the District Court. See the discussion *supra*. But assuming that the application is properly before the court, we turn to the merits.

The basic claim here is that the judgment in *Alleghany* v. *Kirby* was procured by fraud, in that alleged fraud connected with *Zenn* and *Breswick* was known to various counsel in *Alleghany Corp.* v. *Kirby*, who did not report their knowledge to the District Court or this court.

There are two separate claims of fraud being made upon this application: (1) that Fitzsimmons had rendered "special services" to the Kirby, etc. interests in *Zenn* and *Breswick*, and demanded an additional $25,000 fee (over what Alleghany was ready to pay) on account of those services, that Kirby and Ireland knew of Fitzsimmons' "special interest" in the outcome in *Zenn*, and that one of Kirby's attorneys on the appeal in *Alleghany Corporation* v. *Kirby* knew the facts about Fitzsimmons' fee application but failed to disclose them; and (2) that Alleghany, under Kirby's control, knew that Fitzsimmons' report as Referee in *Zenn* had been written by Kirby's attorney, Daly.

Anticipating the objection that these matters were raised in *Smith* v. *Fitzsimmons* (and that, perhaps, the judgment there is *res judicata*), Bobrick and Phillips state that they have evidence to support their allegations which they were afraid to disclose in the District Court for fear of prejudicing the administration of justice by this court.

(1) As to the fee application, the "evidence" adduced breaks into two parts: (a) the admissions of Fitzsimmons and Ireland that they met with respect to the fee application, and the fact that a memorandum submitted by the Donovan firm in *Smith* v. *Fitzsimmons* supporting a motion to dismiss the complaint as to Kirby was "signed by no

identified member of the bar," but states (contrary to Fitzsimmons' affidavit, it is alleged) that Alleghany's counsel had "proffered" $100,000 for Fitzsimmons' services; and (b) a number of memoranda allegedly written by Phillips as he talked by telephone with Ireland in June 1960, and was informed by Ireland of the progress of the fee application.

(a) The fact that Fitzsimmons and Ireland admit having met with respect to the fee, standing alone, means very little if anything. While it can be argued that Fitzsimmons *should* have limited himself to discussing the fee with Justice McGivern, there is nothing in the fact of the Ireland-Fitzsimmons meeting to indicate that the amount of the fee was determined by the parties rather than by the court. As to the $100,000 allegedly "proffered" by Alleghany, the circumstances seem to be adequately explained by the affidavit of Robert M. Loeffler, a partner in the Donovan firm, submitted in opposition to this application. It appears from that affidavit that Justice McGivern asked Loeffler what he thought a proper fee would be, and that Loeffler, without consulting Alleghany, suggested $100,000; Justice McGivern then consulted Fitzsimmons, who stuck to his $150,000 figure; Ireland subsequently authorized a fee of not more than $125,000, and Justice McGivern approved that figure. If this had all gone on before the Referee's report was submitted, there might well be cause for an investigation, but since the report had long before been submitted, it would seem that the applicants must submit something more in the way of evidence to warrant reopening the matter.

(b) Recognizing the need for something more, the applicants have come up with Phillips' three memoranda. The first of these indicates little that is new, except that

allegedly Fitzsimmons told Ireland to "throw up a heavy smokescreen," whatever that may mean. The second memorandum is more interesting, for it indicates that Fitzsimmons, in discussing the fee with Ireland, allegedly had said that he wanted to remind Kirby of "special services." The third memorandum indicates that the alleged "special services" consisted of Fitzsimmons' "general perspective toward the whole case," and of the fact that he "fell over backwards" when there were cries for Kirby's testimony; he "strained" to let Kirby off, and "to say the least," took a "very charitable attitude toward the IDS transaction."

The applicants realize that these memoranda require corroboration to be of any value, and Phillips states in his affidavit on this application that he was advised by counsel against any public disclosure of the memoranda until corroboration could be obtained. It is now claimed that the memoranda are corroborated by the admissions of Fitzsimmons and Ireland that they met with respect to the fee, by the opinions of Judges Moore and Friendly in *Alleghany* v. *Kirby*, both of which recognized (Judge Friendly in considerably stronger terms) that the evidence did not compel the result reached by Fitzsimmons, and by the fact that subsequent to the hearings before Fitzsimmons (in which Kirby was excused from testifying on grounds of illness) Kirby had appeared as a witness in judicial and administrative proceedings. The only possibly significant point among these is the last, and even that loses its impact when it is considered that the hearings before Fitzsimmons took place in 1955, and Kirby's subsequent appearances were in 1960-65.

All of the claimed "corroboration" was available before the District Court proceedings in *Smith* v. *Fitzsimmons*, yet the Phillips memoranda were not made available to that

court. Ireland, in his affidavit on this application, categorically denies the statements attributed to him in the memoranda, and Fitzsimmons, in his affidavit, denies having made any of the statements attributed to him. We find no grounds for reopening, on any such showing, issues once fully litigated.

(2) The "evidence" to support the claim that Daly wrote the Referee's report is even less substantial than that supporting the claims of improper conduct surrounding the fee application. The allegation is, specifically, that court reporter Louis G. Schwartz, to whom the Referee's report was dictated, has "informed a member of the bar of this Court" that Daly wrote the report, but has stated that he would deny that he said such a thing if he were taxed with the statement. The "evidence" is a bill submitted by Schwartz to Alleghany under date of July 31, 1956 for services in typing the report. At that time, Alleghany was under the control of Kirby, and was in favor of the settlement. In September 1957, Schwartz called the bill to the attention of David W. Wallace, an Alleghany attorney, who then wrote Schwartz that it would be improper for Alleghany to pay the bill, since the report had not yet been rendered. The claim is, of course, that Schwartz had submitted the bill to those to whom he had rendered the services, and that this indicates that somebody other than Fitzsimmons had dictated the report.

Both Fitzsimmons and Daly deny the allegation. Schwartz states that the report was dictated to him by John Mooney, an attorney from Fitzsimmons' office, and that it was in accord with the customary practice of his office in protracted reference proceedings to bill Alleghany during the course of the proceedings before Fitzsimmons (they had billed Alleghany, and were paid by Alleghany,

for the transcript of the proceedings). He adds the interesting statement that in June 1966, Phillips told him that the report had been prepared by Daly, and insisted to him that the report must have been dictated by Daly; Schwartz told Phillips that although he had good reason to be angry at Daly, he had no intention of joining in a lie against Daly to say that Daly had dictated the report.

At most, the application stands on a porous foundation and in any case our consideration of it is barred by reason of the litigation of the same issues in *Smith* v. *Fitzsimmons* and their determination by Judge Bonsal on summary judgment sought by plaintiffs themselves. All the matter put forth in support of the so-called 19(c) motions was or could have been presented to Judge Bonsal and may not be held back and subsequently used as the basis for relitigation of the same issues. The motions must be, and are denied.

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Memorandum Opinion of Bonsal, *D.J.*

Defendants Kirby, Fitzsimmons and Alleghany Corporation move pursuant to Rule 12 and Rule 56 of the Federal Rules of Civil Procedure to dismiss the complaint, and plaintiffs move for summary judgment pursuant to Rule 56 on "count" one of the complaint. Defendants' motion to dismiss the complaint is granted and plaintiffs' motion for summary judgment is denied.

In his farewell address to the Congress of the United States, General MacArthur remarked that, "Old soldiers never die; they just fade away." The plaintiffs, stockholders of Alleghany Corporation (Alleghany), champion the notion that old lawsuits never die; nor do they fade away. They seek to resuscitate a long and bitter litigation in which their corporation sought unsuccessfully to set aside a prior settlement of a derivative action instituted by other stockholders of Alleghany against Kirby and others. *Alleghany Corp.* v. *Kirby,* 218 F. Supp. 164 (S. D. N. Y. 1963), *aff'd,* 333 F. 2d 327 (2d Cir. 1964), *aff'd en banc,* 340 F. 2d 311 (1965), *cert. dismissed as improvidently granted, sub nom. Holt* v. *Alleghany Corp.,* 384 U. S. 28 (1966).

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The history of the prior litigation and the IDS transaction which led to it are set forth in full in Judge Dawson's opinion reported at 218 F. Supp. 164 and in the opinions in the Court of Appeals of Judges Moore, Kaufman and Friendly reported at 333 F. 2d 327, and therefore need no repetition here. However, a comment of Judge Moore is particularly appropriate to the present action:

> "Were every settlement which had been carefully examined and judicially approved to be vacated at the

behest of some subsequent corporate champion who brings forth certain documents which he claims might have so influenced the court that the settlement might not have been approved, there would be no finality to any litigation whether by settlement or by judgment." (333 F. 2d 327, at 334)

The champions here are stockholders of Alleghany who now seek to step in where their corporation failed. They have no documents to offer which might have influenced the New York Supreme Court's approval of the 1958 settlement. (*Zenn* v. *Anzalone*, 17 Misc. 2d 897, 191 N. Y. S. 2d 840 (Sup. Ct. N. Y. Co. 1959).) Instead, plaintiffs baldly assert, without factual support, that the defendant Fitzsimmons (the Referee in *Zenn* and the Special Master in this Court in *Breswick & Co.* v. *Briggs*, 135 F. Supp. 397 (S. D. N. Y. 1955)) had an "interest" in approving the *Zenn* settlement, was guilty of allegedly improper conduct,

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and generally was guilty of fraud.

The three stockholder plaintiffs are Morris Smith, alleged to be a citizen of Pennsylvania; Elizabeth Most (who appears to be the wife of plaintiffs' attorney) and David Wiener, alleged to be citizens of New York. Alleghany is a Maryland corporation having its principal office in New York, and defendant Fitzsimmons is alleged in the complaint to be a citizen of New York, so diversity of citizenship exists only with respect to plaintiff Smith. According to the complaint, Smith has been the beneficial owner of five shares of common stock of Alleghany since 1959; Most, the beneficial owner of 20 shares of common stock since

1962; and Wiener, the beneficial owner of 10 shares of preferred stock since 1960 and 50 shares of common stock since 1956. It should be noted parenthetically that none of the plaintiffs were stockholders of Alleghany in 1955 when notice of the proposed settlement in *Zenn* was sent to all stockholders (333 F. 2d 327, at 329) and, consequently, their claim that they received no notice of the settlement finally approved in 1959 and of the $125,000 allowance to Fitzsimmons is lacking in merit. Similarly, plaintiffs' alleged lack of notice of the *Alleghany* v. *Kirby* litigation does not aid them here, particularly in view of the evi-

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dence that Randolph Phillips, a principal figure in *Alleghany* v. *Kirby*, is their "consultant" in this lawsuit.[1]

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[1] In the proceedings in *Alleghany* v. *Kirby* before the Supreme Court resulting in the dismissal of writs of certiorari as improvidently granted (*Holt* v. *Alleghany Corp.*, 384 U. S. 28 (1966)), a brief was filed for Randolph Phillips as *amicus curiae* urging reversal.

An affidavit submitted in support of the motion by Kirby to dismiss the complaint includes a copy of a letter dated May 31, 1966 from Mr. Phillips to Ira Leeman, an attorney, enclosing an authorization form for use by Mr. Leeman's client, Mr. Colombo, presumably a stockholder of Alleghany. The authorization form would authorize Mr. Bobrick, the attorney for the plaintiffs herein, to file a complaint in Mr. Colombo's name, and Mr. Phillips' letter states that, "it will be necessary for Mr. Colombo to meet Mr. Bobrick and verify that he is a stockholder and has been one since at least 1951." The letter goes on to say that "Mr. Bobrick, incidentally, is the husband of Dr. Most [one of the plaintiffs in this action] as well as her attorney, and I [Phillips] am their consultant."

Mr. Colombo also received a circular letter and proxy statement addressed to the stockholders of Alleghany from Dr. Elizabeth Most, dated May 12, 1966, the purport of which was to solicit the stockholders to institute legal proceedings to set aside the 1950 IDS

Memorandum Opinion of Bonsal, D.J.

In the first "count" of their complaint, plaintiffs allege that defendant Fitzsimmons applied for, in *Zenn*, and pur-

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suant to an order of the Supreme Court, New York County (McGivern, J.), received compensation in the amount of $125,000 for his services as Referee in *Zenn* and as Special Master in *Breswick*. Plaintiffs seek to recover on behalf of Alleghany the $125,000 paid to Fitzsimmons and seek to have the order declared null and void. Plaintiffs argue that this court has jurisdiction to set aside an order of the State court because of Fitzsimmons' alleged misconduct in connection with his allowance and because under Rule 53(a) of the Federal Rules of Civil Procedure the State court had no power to make an allowance to Fitzsimmons for his services as Special Master in *Breswick*.

The alleged acts of misconduct are: first, that Fitzsimmons consulted secretly with Ireland, an attorney representing Kirby and Alleghany, and then communicated the fact of his "secret" consultation to Judge McGivern *ex parte;* second, that due to the conflicting interests of Alleghany and Kirby with respect to who would pay Fitzsimmons' compensation, the representation of Alleghany and Kirby by the same attorneys deprived Alleghany of

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transaction, and which state, after referring to *Alleghany* v. *Kirby*, that,

> "The case therefore is terminated unless new evidence is found or new legal issues presented to cause its re-opening. We propose to retain new attorneys and experts for that purpose."

The new attorney is Dr. Most's husband; the consultant is the same Mr. Phillips; and the new "evidence" is defendant Fitzsimmons' alleged fraud.

independent counsel; and third, that Fitzsimmons based his application for compensation as Referee and Special

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Master on the value of the ultimate settlement in *Zenn*.

Whether the question of setting aside the State court order granting Fitzsimmons compensation is governed by State law (see *Alleghany* v. *Kirby*, 218 F. Supp. 164, 183-84) or by Federal law because of plaintiffs' argument based on Rule 53 (see 7 Moore, Federal Practice ¶60.37(3), at 634 (2d ed. 1966)), plaintiffs have failed to state a claim upon which relief can be granted.

The allegations of misconduct relate to matters that were known by the litigants and by the court in *Zenn*. Consequently, there is no basis for an independent action in equity. See *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238 (1944); *Marshall* v. *Holmes*, 141 U. S. 589 (1891); *United States* v. *Throckmorton*, 98 U. S. 61 (1878); *Crouse* v. *McVickar*, 207 N. Y. 213 (1912); *In re Adoption of Brundage*, 134 N. Y. S. 2d 703 (Sup. Ct. Orange Co. 1954), *aff'd without opinion*, 143 N. Y. S. 2d 611 (2d Dept. 1955).

Plaintiffs' argument based on Rule 53(a) amounts to no more than a claim that the State court committed error in its award of compensation to Fitzsimmons. Even if the State court was wrong in considering Fitzsimmons' services as Special Master when determining the amount of

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the allowance to be made (see *In re Gilbert*, 276 U. S. 6 (1928); *cf. Leiman* v. *Guttman*, 336 U. S. 1 (1949); *Brown* v. *Gerdes*, 321 U. S. 178 (1944)), relief was available by appeal seeking a reduction in the allowance and a direction

that Kirby pay part or all of any allowance that was made. See *Sheriff* v. *Heyman*, 23 A. D. 2d 555, 256 N. Y. S. 2d 641 (1st Dept.), *aff'd without opinion*, 16 N. Y. 2d 944, 264 N. Y. S. 2d 928 (1965); *Cross Properties, Inc.* v. *Gimbel Brothers, Inc.*, 15 A. D. 2d 908, 225 N. Y. S. 2d 1019 (1st Dept. 1962). Under neither Federal nor State law can an independent action be maintained for the purpose of reviewing and correcting error in a final judgment. *Ackerman* v. *United States*, 340 U. S. 193 (1950); *United States* v. *Borchers*, 163 F. 2d 347 (2d Cir.), *cert. denied*, 332 U. S. 811 (1947); *Herpe* v. *Herpe*, 225 N. Y. 323 (1919); *Fisher* v. *Hepburn*, 48 N. Y. 41 (1871); *West 158th Street Garage Corp.* v. *State*, 256 App. Div. 401, 10 N. Y. S. 2d 990 (3d Dept. 1939).

The second "count" of the complaint (charging defendant Fitzsimmons with violating Section 14 of the New York Judiciary Law) alleges that he was "interested" in the matters which were at issue in *Zenn* and *Breswick*, that Kirby's counsel wrote the report Fitzsimmons submitted as Referee in *Zenn*, and sets forth various quotations from the Court

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of Appeals' opinions in Alleghany for the purpose of showing that the approval of the *Zenn* settlement in *Alleghany* was a close question. Based on the allegations of the second "count," plaintiffs seek a judgment rescinding the 1950 IDS transaction which was the subject matter of the settlement in *Zenn*, or an award of damages against Kirby "measured by the value of a rescission of said transaction."

The third and fourth "counts" of the complaint are largely a reiteration of the allegations in the first two "counts," with the addition of allegations of a conspiracy

and of "overt acts" and allegations asserting violation of the rights of the plaintiffs "and the absent shareholders" of Alleghany under the 14th Amendment and 42 U. S. C. A. 1983, 1985(2) and 1985(3). Based on these allegations, plaintiffs seek an order directing Kirby to reimburse Alleghany for its damages; a judgment declaring null and void the orders and judgments of the State court in *Zenn* and the releases delivered to Kirby as a result thereof; a preliminary and permanent injunction prohibiting Kirby from relying on the orders or judgments in *Zenn* to plead the defenses of *res judicata* or collateral estoppel; a declaratory judgment that the judgments of this court, the Court of Appeals and the Supreme Court in *Alleghany* v. *Kirby*

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were procured by fraud; and an order prohibiting Kirby from participating as a stockholder in any way in the damages adjudged payable to Alleghany.[2]

By these allegations of misconduct on the part of Fitzsimmons, plaintiffs seek to reopen the extended litigation

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[2] In their demand for relief, plaintiffs seek a declaratory judgment that the continued existence of Alleghany is against the public interest and the interest of minority stockholders and a judgment requiring the dissolution of Alleghany and the distribution of its assets on a fair and equitable basis. Under Maryland law there is no basis for this relief in the present action. See Art. 23 Maryland Code Ann. §§76-83; *Coffman* v. *Maryland Pub. Co.*, 167 Md. 275, 173 Atl. 248 (1934); *Howeth* v. *Coulbourne Bros. Co.*, 115 Md. 107, 80 Atl. 916 (1911). In any event, since a Maryland corporation is involved, the relief could not be sought in the New York state courts (see *Langfelder* v. *Universal Laboratories, Inc.*, 293 N. Y. 200 (1944); *Adolph Meyer, Inc.* v. *Florists Telegraph Delivery Ass'n*, 36 Misc. 2d 566, 232 N. Y. S. 2d 913 (Sup. Ct. Queens Co. 1962)) and consequently cannot be sought in this court. See *Weiss* v. *Routh*, 149 F. 2d 193 (2d Cir. 1945).

in *Alleghany* and to relitigate the question of whether the settlement in *Zenn* was procured by fraud. This was the same question Judge Dawson had before him in *Alleghany*, originally instituted as a derivative action in 1962 when plaintiffs Smith and Wiener were stockholders of Alleghany, and the attempt to litigate it again is barred by the

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doctrine of *res judicata*. As stockholders in Alleghany, plaintiffs are bound by the earlier litigation in Alleghany (*E.g., Reiter* v. *Universal Marion Corp.*, 299 F. 2d 449 (D. C. Cir. 1962); *Dana* v. *Morgan*, 232 Fed. 85 (2d Cir. 1916); *Phillips* v. *Bradford*, 228 F. Supp. 397 (S. D. N. Y. 1964); *Grant* v. *Greene Consolidated Copper Co.*, 169 App. Div. 206, 154 N. Y. S. 596 (1st Dept. 1915), *aff'd without opinion*, 223 N. Y. 655 (1918)) and the bar of *res judicata* extends to all matters which could have been litigated as well as to all matters actually litigated.[3] *E.g., Nichols* v.

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[3] Plaintiffs argue that the bar of *res judicata* does not apply to their action because it is sanctioned under Rule 60(b) F. R. Civ. P. as an independent action in equity. Reliance is placed on such cases as *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co., supra*, and others cited in 7 Moore, Federal Practice ¶60.18 (8) (2d ed. 1966). Plaintiffs' conclusory allegations that Fitzsimmons had a "hidden interest" in approving the *Zenn* settlement and was biased in favor of Kirby and that Kirby's counsel wrote Fitzsimmons' report, will not support the attempt here to circumvent the bar of *res judicata*. See *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399 (1923); *Nichols* v. *Alker*, 235 F. 2d 246 (2d Cir. 1956).

Although plaintiffs state that the basis for their action is fraud perpetrated in the *Alleghany* litigation, in substance their claim is that new evidence has been discovered which would have changed the result in *Alleghany* had it been introduced. However, no showing has been made that this "newly discovered evidence" could not have been presented in the original *Alleghany* litigation (compare *Marshall* v. *Holmes, supra; United States* v. *Throckmorton, supra*),

Alker, 231 F. 2d 68 (2d Cir.), *cert. denied,* 352 U. S. 829 —583— (1956); *Stella* v. *Kaiser,* 218 F. 2d 64 (2d Cir. 1954), *pet. for rehearing denied,* 221 F. 2d 115 (1955), *cert. denied,* 350 U. S. 835 (1955); *Wolcott* v. *Hutchins,* 245 F. Supp. 578 (S. D. N. Y.), *aff'd,* 365 F. 2d 833 (2d Cir. 1966); *Phillips* v. *Bradford, supra.*

Despite the years of litigation involved in *Alleghany, Zenn* and *Breswick,* plaintiffs seek to again challenge the 1950 IDS transaction which was the subject of the *Zenn* settlement. A reading of the three opinions of the panel in the Court of Appeals in *Alleghany* v. *Kirby* (333 F. 2d 327) where the panel split 2-1 in favor of affirming Judge Dawson, and the subsequent affirmance *en banc* by a 4-4 vote, indicates that the *Zenn* settlement was sustained in *Alleghany* v. *Kirby* by a close margin. Plaintiffs would tip the balance against the settlement by the straw of defendant Fitzsimmons' alleged fraud. However, plaintiffs offer nothing to support their charge which is emphatically denied by Fitzsimmons. Contrary to the complaint, the record is clear that Alleghany, through its attorneys, did actively contest the matter of Fitzsimmons' compensation. The opinions in the District Court and the Court of Appeals in *Alleghany* v. *Kirby* clearly demonstrate that the recom-

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and after one full opportunity for pre-trial discovery (*Alleghany* v. *Kirby,* 218 F. Supp. 164, 169) no reason appears for permitting depositions to be taken once again. Even if plaintiffs' "new evidence" would give them a better prospect of success, the reopening of a final judgment would not therefore be warranted. *Pickford* v. *Talbott,* 225 U. S. 651 (1912).

mendations of defendant Fitzsimmons as Special Master received the most careful scrutiny.

Judge Moore's statement previously quoted is particularly apt here. Alleghany having had its day in court, was unsuccessful in its effort to set aside the *Zenn* settlement. Its stockholders are bound by the result. Otherwise, "there would be no finality to any litigation, whether by settlement or by judgment."

This action which seeks to reopen the Alleghany litigation on the basis of conclusory and unsupported allegations of fraud hardly appeals to the conscience of a court of equity, particularly if there has been a solicitation of Alleghany stockholders, participated in by Mr. Phillips, for the purpose of bringing the action.

Defendants Fitzsimmons, Kirby and Alleghany's motion to dismiss the complaint is granted and plaintiffs' motion for summary judgment on the first "count" of their complaint is denied.[4]

Settle order on notice.

Dated: New York, N. Y.
February 7, 1967.

DUDLEY B. BONSAL
U.S.D.J.

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[4] The defendants Fitzsimmons, Kirby and Alleghany have moved to strike interrogatories served upon them by the plaintiffs. Since the defendants' motion to dismiss the complaint has been granted, the defendants' motions to strike interrogatories have also been granted, though they will become moot on the entry of the order herein.

UNITED STATES COURT OF APPEALS

Second Circuit

Rec'd 6/11/68

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of June, one thousand nine hundred and sixty-eight

Allegheny Corporation,
Plaintiff-Appellant,
v.
Allan P. Kirby, Jr., and Fred M. Kirby II as Guardians of the Property of Allan P. Kirby,
Defendants-Appellees.

Morris Smith and David Wiener,
Applicants-Appellants,
v.
Allegheny Corporation,
Plaintiff-Appellee,
Allan P. Kirby, Jr., and Fred M. Kirby II as Guardians of the Property of Allan P. Kirby; Fred M. Kirby and Charles T. Ireland, Jr.,
Defendants-Appellees.

Morris Smith and David Wiener, et al.,
Plaintiffs-Appellants,
v.
Robert J. Fitzsimmons, et al.,
Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellants Morris Smith and David Wiener, and appellant Randolph Phillips pro-se to vacate the opinion and judgment filed herein on May 8, 1968

be and it hereby is denied.

A. DANIEL FUSARO
Clerk.

* * * * * *

BEFORE: HON. Henry J. Friendly

HON. [redacted]

[redacted]

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of May one thousand nine hundred and sixty-eight.

Present: HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges,
HON. EDWARD T. DIGNOUX,
District Judge.

DOCKETED AS
A JUDGMENT 69,399
ON June 27, 1968
AT M.

U.S. DISTRICT COURT
FILED
JUN 27 1968
S.D. OF N.Y.

Morris Smith and David Wiener, individually and on their own behalf and that of all other shareholders of Alleghany Corp., similarly situated and derivatively on behalf of Alleghany Corp.,
Plaintiffs-Appellants,

v.

Robert J. Fitzsimmons; Allan P. Kirby, Jr., and Fred M. Kirby II as Guardians of the Property of Allan P. Kirby; and Alleghany Corp.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to the appellees Robert J. Fitzsimmons and Allan P. Kirby, Jr., and Fred M. Kirby II as Guardians of the property of Allan P. Kirby.

A. DANIEL FUSARO
Clerk

United States Court of Appeals

FOR THE

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of May one thousand nine hundred and sixty-eight.

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HON. HENRY J. FRIENDLY,

HON. J. JOSEPH SMITH, Circuit Judges,

HON. EDWARD T. GIGNOUX, District Judge.

60 Civ 3511

~~Circuit Judges~~

ENTERED AS THE JUDGMENT OF THIS COURT ON June 27, 1968 AT M.

U. S. DISTRICT COURT FILED JUN 27 1968 S. D. OF N. Y.

Morris Smith and David Wiener,

Applicants-Appellants,

v.

Alleghany Corporation,
Plaintiff-Appellee,
Allan P. Kirby, Jr., and Fred M. Kirby II as Guardians of the Property of Allan P. Kirby; Fred M. Kirby and Charles T. Ireland, Jr.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to the appellee, Alleghany Corporation and to the defendants-appellees, Allan P. Kirby, Jr., et al.

A. DANIEL FUSARO
Clerk

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of May , one thousand nine hundred and sixty-eight.

Present:

HON. HENRY J. FRIENDLY,

HON. J. JOSEPH SMITH,
Circuit Judges,

HON. EDWARD T. GIGNOUX,
District Judge.

~~Circuit Judges~~

Alleghany Corporation,

Plaintiff-Appellant,

v.

Allan P. Kirby, Randolph Phillips, Charles T. Ireland, Jr., and Fred M. Kirby,

Defendants-Appellees.

A motion having been made herein by counsel for applicants David Wiener and Morris Smith and by Randolph Phillips pro se to direct said applicants to conduct an investigation to aid this court in determining if its judgment was procured by fraud upon the court and "absent parties"

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk